

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**F.H., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE,  
WARNER ROBINS AIR FORCE BASE, GA,  
Employer**

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**Docket No. 07-1379  
Issued: November 24, 2008**

*Appearances:*

*Steven Harrell, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On April 25, 2007 appellant, through his attorney, filed a timely appeal from a January 31, 2007 merit decision of the Office of Workers' Compensation Programs finding that he forfeited his entitlement to compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether the Office properly determined that appellant forfeited his entitlement to compensation for the periods January 30, 1996 through April 30, 1997 and June 21, 1997 through September 21, 1998 because he failed to report earnings from employment.

**FACTUAL HISTORY**

On December 6, 1994 appellant, then a 40-year-old electronics engineer, sustained injury to his right lumbosacral spine while pushing a computer terminal. He stopped work on

December 7, 1994. The Office accepted appellant's claim for lumbar strain and an aggravation of pars defect. It placed him on the periodic rolls effective June 6, 1995.

By decision dated December 8, 1995, the Office terminated appellant's compensation effective that date on the grounds that he had no further employment-related disability. In a decision dated April 9, 1997, an Office hearing representative reversed the December 8, 1995 decision. The Office reinstated him on the periodic rolls effective January 25, 1996.

On April 30, 1997 appellant signed an affidavit of earnings and employment (Form EN1032) covering the prior 15-month period. The form advised that he must report all employment or self-employment from which he received "a salary, wages, income, sales commissions, piecework, or payment of any kind." The EN1032 form notified appellant that he was obligated to immediately report any employment to the Office and that fraudulently concealing or failing to report income could subject him to criminal prosecution. On the April 30, 1997 EN1032 form, he indicated that he did not work for an employer during the previous 15 months but was self-employed. Appellant specified that he had rental houses which he paid "to have repaired and managed." He asserted that he earned no profit from the rental houses and that as a result of his injury he had to hire someone to perform repairs. Appellant did not list any earnings from employment or self employment. On September 21, 1998 he signed another EN1032 form covering the previous 15-month period. Appellant indicated that he was not employed or self employed but did repair and manage several rental houses. He maintained that the rental houses were not profitable. Appellant specified on the EN1032 form that he had no earnings from employment.

On April 3, 2000 an investigator with the employing establishment requested information from insurance companies about appellant's dates of employment and earnings. On April 6, 2000 Empire General Life Assurance Corporation provided a listing of commissions paid to him from 1997 to 2000. The company noted that appellant's one policy written with the company had been terminated for lack of payments of premiums. He earned \$26.41 in 1997 and \$7.13 in 1998. On April 7, 2000 Life USA submitted a copy of appellant's signed agency agreement but noted that he had not been paid any commissions. On April 11, 2000 Penn Mutual Life Insurance Company (Penn Mutual) related that appellant "has been under an agents' contract since April 3, 1997. He earned \$1,650.00 in 1997, \$5,049.00 in 1998 and \$1,934.85 in 1999. A Form 1099 reporting miscellaneous income for tax purposes from Penn Mutual indicated that he earned \$2,640.00 in 1997, \$8,019.00 in 1998 and \$2,858.15 in 1999 in nonemployee compensation. On April 11, 2000 First Penn-Pacific Life Insurance Company related that appellant worked for the company as an independent contractor effective August 20, 1997 but did not have any earnings. The company submitted its agency appointment agreement, signed by appellant on August 3, 1997. On April 12, 2000 Nationwide Mutual Insurance Company indicated that it had appellant listed as a broker but did not have tax statements. He was terminated in 1998. On April 28, 2000 Celtic Life Insurance Company submitted copies of cancelled commission checks and appointment information from August 1, 1999 to the present. On May 26, 2000 Transamerica Life Companies (Transamerica) provided commission statements from August 1999 to April 2000, copies of cancelled checks and a 1099 for 1999. Appellant signed a contract application to work as an independent producer with Transamerica on April 9, 1999. On the application, he indicated that he had worked as an insurance agent or

broker for 20 years and had represented First Colony Life since 1981, Jackson Mutual Life Insurance Company since 1985 and Penn Mutual since 1996.

In a September 8, 2000 investigative memorandum, a special agent with the employing establishment related that appellant worked as a self-employed insurance agent.<sup>1</sup> Appellant had earnings from 12 different insurance companies totaling \$5,347.03 in 1997, \$6,105.48 in 1999 and \$565.81 in 2000.

By decision dated September 7, 2001, the Office found that appellant forfeited his entitlement to compensation for the periods January 30, 1996 through April 30, 1997 and June 21, 1997 through September 21, 1998 because he failed to report earnings from employment. It found that he earned \$5,347.03 in 1997, \$13,205.26 in 1998, \$6,105.48 in 1999 and \$565.81 in 2000 but did not report his earnings on EN1032 form dated April 30, 1997 and September 21, 1998. The Office determined that the forfeiture created an overpayment of \$100,740.53 in compensation and notified appellant of the preliminary overpayment finding that he was at fault in its creation. It also advised him of its preliminary determination that he received an overpayment of \$7,856.84 as he had outside earnings from May 1 through June 20, 1997 and from September 22, 1998 through February 26, 2000 while receiving compensation for total disability. The Office informed appellant of its preliminary determination that he was at fault in the creation of the overpayment.

Appellant and his spouse completed a federal income tax return (Form 1040) in 1996. In a Schedule C, Profit or Loss from Business (Sole Proprietorship), accompanying the 1996 Form 1040, he indicated that he earned \$11,537.00 in his business of insurance/sales. Appellant deducted \$10,731.00 in expenses for a total profit of \$806.00. In a handwritten Schedule C attachment, he listed insurance income in 1996 of \$320.32 with United of Omaha, \$10,245.66 with First Colony Life, \$242.64 with Life of Virginia, \$170.13 with Jackson National Life, \$20.08 with Zurich,<sup>2</sup> and \$528.15 with Empire General. Appellant attached statements showing that in 1996 he earned \$217.35 from Life of Virginia, \$528.15 from Empire General and \$1,134.25 from Jackson Life.

In a 1997 Schedule C-EZ, Net Profit from Business (Sole Proprietorship), accompanying appellant's 1997 Form 1040, appellant listed a net profit from insurance/sales of \$815.00. In a 1997 Schedule C, Profit or Loss from Business (Sole Proprietorship), he provided his principal business or profession as insurance/sales. Appellant listed \$6,337.00 as gross receipts on sales and \$6,396.00 in expenses. In a 1998 Schedule C, accompanying his 1998 Form 1040, appellant indicated that he earned \$8,547.00 in gross receipts or sales in the business of insurance/sales. He deducted \$6,200.00 in expenses for a total profit of \$2,347.00.

On October 2, 2001 appellant requested a prerecoupment hearing. On March 26, 2002 Penn Insurance & Annuity indicated that it did not pay appellant any income in 1997, 1998 and

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<sup>1</sup> By decision dated February 18, 2000, the Office suspended appellant's benefits because he did not complete and return Form CA-1032. On April 17, 2001 it reinstated his compensation based on its receipt of his Form CA-1032 and paid him retroactive compensation.

<sup>2</sup> The complete name of the company is not legible.

1999. The company noted that it was a subsidiary of Penn Mutual and that payroll records “would indicate that payments are made through the parent company, Penn Mutual Life.”

Appellant’s attorney submitted a statement showing gross earnings from insurance companies. Appellant indicated that he earned a total of \$5,347.03 in 1997, \$13,205.26 in 1998, \$7,098.37 in 1999 and \$26,064.99 in 2000 from various insurance companies, including Penn Mutual and Penn Insurance & Annuity. The attorney maintained that appellant earned an average of \$39.09 per week during this period and received an overpayment of \$1,118.08. On April 9, 2002 the Office received a copy of an insurance policy dated October 21, 1997. The policy listed appellant as the servicing agent.

In a report dated April 2, 2002, Dr. Donald S. Meek, a clinical psychologist, diagnosed a learning disorder not otherwise specified and an adjustment and pain disorder. He found that appellant appeared to have problems processing visual information and with his memory. Dr. Meek stated, “He may therefore have difficulty processing information *via* visual and auditory processes and become confused in emotionally laden situations.” He advised that appellant could “manage his legal and financial affairs appropriately.”

At the hearing, held on April 9, 2002, appellant’s attorney contended that appellant only serviced contracts that he had previously sold rather than selling new insurance contracts. Counsel also maintained that appellant did not receive money from Penn Insurance and Annuity. He noted that appellant bought several policies for himself and his mother which were counted as income. Council contended that when his earnings were averaged he had only a \$1,018.00 overpayment of compensation. Appellant testified at the hearing that he had dyslexia and learning disabilities. He maintained that he did not actively earn money from selling insurance but only serviced existing clients. Appellant submitted a Form 1099 for Penn Mutual which he alleged showed commissions that he was paid on a life insurance policy that he purchased for himself. He also purchased a long-term care insurance policy for his mother. Appellant earned \$2,347.00 in 1998 from selling insurance and \$2,871.00 in 1999. He did not solicit for new customers but would make change that existing clients wanted to make to their policies, such as increasing the amount of their insurance. Appellant had about 35 to 40 clients. He did not see his earnings as sales commissions because he was not selling insurance but instead servicing existing clients.

By decision dated February 23, 2003, the Office hearing representative affirmed the September 7, 2001 forfeiture decision and finalized the finding that appellant received an overpayment of \$100,740.53 for the periods January 30, 1996 through April 30, 1997 and June 21, 1997 through September 21, 1998 based on the forfeiture of compensation and that he was at fault in the creation of the overpayment.<sup>3</sup> He concluded that appellant’s earnings from insurance commissions were not *de minimus* as he earned \$11,537.00 in 1996, \$6,337.00 in 1997 and \$8,547 in 1998. The hearing representative also found that appellant had not established that he was incapable of understanding the form due to his dyslexia.

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<sup>3</sup> The hearing representative further found that the Office erred in issuing a final decision on the overpayment of \$7,856.84 as appellant had requested a preresoupment hearing.

On February 20, 2004 appellant, through his attorney, requested reconsideration of his forfeiture of compensation. Counsel argued that his earnings selling insurance constituted dissimilar employment and would not have affected his workers' compensation benefits. The attorney also argued that appellant viewed his earnings as passive as it "substantially involved policy renewals...." He argued that appellant did not willfully conceal earnings as he reported them to the Federal Government on his income tax returns. Counsel argued that appellant's cognitive impairment affected his ability to understand and complete the EN1032 form.<sup>4</sup> He also disputed including the commissions earned from the sale of insurance policies for appellant and his mother as income. The attorney submitted a report dated April 1 and 2, 2003 from Dr. Meck, who diagnosed a learning disorder not otherwise specified. Dr. Meck found that appellant may require additional time on timed tasks and again found problems processing visual and auditory information and impaired memory in comparison to his intellect.

By decision dated May 11, 2004, the Office denied modification of its prior decision.

On May 5, 2005 appellant again requested reconsideration. He argued that he earned only \$8,130.72 for the period in question largely by servicing existing life insurance contracts. Appellant reported all income on his federal tax return. He contended that a conspiracy existed between his former spouse and the employing establishment to bring fraud charges against him and ruin him financially. The employing establishment retaliated against him because he exposed breaches in environmental regulations. Appellant submitted evidence regarding civil actions between himself and his wife in 2000 and 2002. He also submitted documents and orders relating to an individual's removal of solid waste from the employing establishment. In a December 2, 1996 consent order, the state Department of Natural Resources penalized the individual for allowing open dumping. On March 6, 1997 a geologist with the state Department of Natural Resources noted that the individual had disposal contracts with the employing establishment, but that the employing establishment stopped work on the disposal contract when notified of the consent order. In a letter dated April 26, 2005, Penn Mutual indicated that it paid appellant \$2,640.00 in 1997 and \$8,019.00 in 1998.<sup>5</sup>

By decision dated December 19, 2005, the Office denied appellant's request for reconsideration on the grounds that it was untimely and did not establish clear evidence of error. By decision dated February 24, 2006, it denied his request for a hearing under 5 U.S.C. § 8124 as he had previously requested reconsideration of his claim. After further consideration, by decision dated April 7, 2006, the Office denied modification of its May 11, 2004 decision. It noted that appellant had timely requested reconsideration and thus reviewed the merits of his claim. The Office determined that he had not established that he was unable to comprehend the reporting requirements outlined on the EN1032 form. It noted that the amount of the overpayment was \$100,740.53 as appellant forfeited the entire amount of the compensation he received for the periods January 30, 1996 through April 30, 1997 and June 21, 1997 through September 21, 1998.

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<sup>4</sup> Appellant raised substantially similar arguments in a statement dated February 20, 2003.

<sup>5</sup> Appellant also submitted evidence relevant to requests he made to the employing establishment under the Freedom of Information Act.

On March 31, 2006 appellant appealed to the Board. On August 18, 2006 the Board set aside the December 19, 2005 decision and remanded the case for the Office to consider appellant's timely request for reconsideration under 20 C.F.R. § 10.606(b)(2).<sup>6</sup> The Board found that the Office's April 7, 2006 decision, issued while the Board had jurisdiction over the case, was null and void.<sup>7</sup>

By decision dated January 31, 2007, the Office denied modification of its May 11, 2004 decision. It noted that it had previously addressed appellant's contention that he was not competent to complete the EN1032 form. The Office also found that he had not submitted evidence showing a conspiracy against him by his former wife or retaliation by the employing establishment for exposing hazardous waste.

### **LEGAL PRECEDENT**

Section 8106(b) of the Federal Employees' Compensation Act provides that an employee who "fails to make an affidavit or report when required or knowingly omits or understates any part of his earnings, forfeits his right to compensation with respect to any period for which the affidavit or report was required."<sup>8</sup>

The Board has held that it is not enough merely to establish that there were unreported earnings or unemployment. Appellant can be subjected to the forfeiture provisions of 5 U.S.C. § 8106(b) only if he "knowingly" failed to report employment or earnings.<sup>9</sup> The term "knowingly" as defined in the Office's implementing regulation, means "with knowledge, consciously, willfully or intentionally."<sup>10</sup>

### **ANALYSIS**

The Office found that appellant forfeited his entitlement to compensation from January 30, 1996 through April 30, 1997 and June 21, 1997 through September 21, 1998 because he failed to report earnings from employment on a Form EN1032. On April 30, 1997 and September 21, 1998 appellant signed a Form EN1032 covering the prior 15-month periods. On the forms, he indicated that he did not perform any work for an employer but had rental houses which he managed at a loss. Appellant listed no earnings from employment or self-employment.

On September 8, 2000 a special agent with the employing establishment notified the Office that appellant worked as an insurance agent. She submitted responses to inquiries regarding his earnings from various insurance companies. Tax forms completed by appellant

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<sup>6</sup> Order Remanding Case and Cancelling Oral Argument, Docket No. 06-1044 (issued August 18, 2006).

<sup>7</sup> See *Douglas E. Billings*, 41 ECAB 880 (1990).

<sup>8</sup> 5 U.S.C. § 8106(b).

<sup>9</sup> *Ronald E. Ogden*, 56 ECAB 278 (2005); *Barbara L. Kanter*, 46 ECAB 165 (1994).

<sup>10</sup> 20 C.F.R. § 10.5(n).

reveal that he earned \$11,537.00 from insurance/sales in 1996, \$6,337.00 in 1997 and \$2,347.00 in 1998. An insurance policy dated October 21, 1997 listed him as the servicing agent. Appellant thus had unreported earnings from employment during the time periods covered by the EN1032 form dated April 30, 1997 and September 21, 1998.

Appellant contends that his earnings were substantially less when expenses were deducted from his gross earnings and were not sufficient to affect his wage-earning capacity. He further disagreed with the exact amount that he earned during the relevant period. Appellant asserted that he did not work for Penn Insurance and Annuity and that the Office should not have included the commissions he received on the sale of insurance contracts he purchased for himself and his mother. Office regulations, however, provide that, if an employee knowingly omits or understates earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required.<sup>11</sup> There is no provision for offset or payment based on the amount of income actually received. Whether the employee makes a profit on his activities is also not relevant.<sup>12</sup> Additionally, the earnings appellant received from the sale of insurance contracts he purchased would constitute income from commissions.

Appellant can be subject to the forfeiture provision of section 8106(b) only if he “knowingly” failed to report earnings or employment. The Office has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully, or intentionally, fail to report earnings from employment.<sup>13</sup> Appellant completed EN1032 forms which advised him that he must report both all employment and all earnings from employment and self-employment. The EN1032 form clearly stated that he could be subject to criminal prosecution for false or evasive answers or omissions. The factual circumstances of record, including his signing of strongly worded certification clauses on the EN1032 form, provide persuasive evidence that he “knowingly” understated his earnings and employment information.<sup>14</sup> Appellant’s filing of a tax return advising the Internal Revenue Services of income generated by his business is persuasive evidence that he knew that he had income from employment. He misrepresented his earnings and, therefore, forfeited his right to all compensation for the periods January 30, 1996 through April 30, 1997 and June 21, 1997 through September 21, 1998.

Appellant contended that he did not knowingly fail to report earnings as he did not actively sell insurance but serviced existing contracts. The EN1032 form, however, clearly provide that all earnings, including those from commissions, must be reported. Appellant characterized his earnings as passive. His activities, however, were not those of a passive

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<sup>11</sup> 20 C.F.R. § 10.529(b); *Harold F. Franklin*, 57 ECAB 287 (2006).

<sup>12</sup> *Terryl A. Geer*, 51 ECAB 168 (1999).

<sup>13</sup> 20 C.F.R. § 10.5(n).

<sup>14</sup> *See generally Robert C. Gilliam*, 50 ECAB 334 (1998).

investor. Appellant actively participated in servicing insurance contracts by providing changes and renewals of existing contracts.<sup>15</sup>

Appellant asserted that he was unable to understand the forms because he has dyslexia. He submitted reports dated April 2, 2002, April 1 and 2, 2003 from Dr. Meck, who diagnosed a learning disorder not otherwise specified and an adjustment and pain disorder. Dr. Meck opined that appellant had difficulty processing information and had memory problems. In his April 2, 2002 report, however, he found that appellant could “manage his legal and financial affairs appropriately.” Appellant has not submitted evidence establishing that he was mentally incapacitated or otherwise incompetent to handle his affairs at the time that he signed the EN1032 form on April 30, 1997 and September 21, 1998.

Appellant further alleged that the employing establishment and his former spouse conspired against him. He submitted court documents relevant to civil actions between himself and his spouse and documents relevant to an environmental investigation by the state. This is not relevant, however, to the pertinent issue of whether the Office established that appellant knowingly omitted earnings from employment or self employment during the period covered by the April 30, 1997 and September 21, 1998 EN1032 form. The Board finds that the Office met its burden of proof and thus properly determined that he forfeited his entitlement to compensation.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant forfeited his entitlement to compensation for the periods January 30, 1996 through April 30, 1997 and June 21, 1997 through September 21, 1998 because he failed to report earnings from employment.

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<sup>15</sup> Appellant also asserted that his earnings from selling insurance constituted dissimilar employment. However, the Board has held that 5 U.S.C. § 8106(b)(2) makes no exception for reporting earnings in concurrent dissimilar employment. See *Earl D. Long*, 50 ECAB 464, 467 (1999).



**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 31, 2007 is affirmed.

Issued: November 24, 2008  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board